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Welcome to the February 2024 edition of the HFW Australian Mining Bulletin.

In this edition, we cover recent case law developments of interest to the Australian mining industry, including exploration licence applications and expenditure exemptions in Western Australia; how the Minister must assess public interest considerations in Queensland; the meaning of 'refining' in a tenement sale agreement; and misleading earnings guidance by an ASX-listed service provider.

WARDENS' INTERPRETATION OF THE REQUIREMENTS FOR EXPLORATION LICENCES CHALLENGED IN THE SUPREME COURT

The Perth Mining Wardens have repeatedly and unanimously determined that section 58(1)(b) of the *Mining Act 1978* (Act) requires exploration licence applications to contain details of exploration plans and estimated expenditure for the full five-year term, and full licence area, and that non-compliant applications are invalid (see *Golden Pig Enterprises Pty Ltd v O'Sullivan* [2021] WASC 396, *True Fella Pty Ltd v Pantoro South Pty Ltd* [2022] WAMW 19, *Azure Minerals Ltd v D & G Geraghty Pty Ltd* [2022] WAMW 27 and *Toolonga Mineral Sand Pty Ltd v Callum and Belinda Carruth & Ors* [2023] WAMW 6). The Supreme Court will soon hear a challenge to this view in CIV 2404 of 2023.

In *William Robert Richmond v Regis Resources Limited* [No.2] [2023] WAMW 23, Regis Resources objected to Mr Richmond's applications for two exploration licences. Warden McPhee determined that the applications were invalid because, by failing to include an exploration plan for the life of the licence, the accompanying s 58(1)(b) statements did not comply with the requirements of the section.

As a result, subject to any specific order to the contrary, the Perth Mining Wardens have paused hearing further exploration licence applications of this nature until at least 6 May 2024.

SUPREME COURT CONFIRMS PURPOSE OF CAPITAL RAISING CRUCIAL WHEN SEEKING AN EXPENDITURE EXEMPTION

In *Riversgold (Australia) Pty Ltd v McPhee in his capacity as Mining Warden* [2023] WASC 375, the Supreme Court confirmed that, where an exemption is sought under s 102(2)(b) of the Act on the basis that time is required to raise capital, the purpose of that capital raising must be to permit evaluation of work done on the tenement, or to plan or conduct exploration or mining on the tenement. Further, the actual purpose of the capital raising is a matter of substance over form which will be carefully scrutinised. Accordingly, the Court upheld the Warden's determination that the purpose of Riversgold's capital raising was not to fund exploration planning or exploration activities but, instead, to maintain its cash reserves at the level desired by its directors. As a result, the Court upheld the Warden's recommendation to refuse the expenditure exemptions.

Riversgold and Serendipity Resources Pty Ltd (collectively **Riversgold**) challenged the Warden's recommendation to refuse expenditure exemptions in respect of four exploration licences they held jointly. Debnal Pty Ltd and Miramar (Goldfields) Pty Ltd, the neighbouring tenement-holders, objected. Riversgold argued for an exemption pursuant to s 102(2)(b) or 102(3) of the Act, and challenged the Warden's decision, alleging misapplication of the test under s 102(2)(b) of the Act.

Section 102(2)(b) provides that an exemption may be granted where time is required to evaluate work done on the tenement, plan future exploration or mining or raise capital for those purposes. Riversgold sought exemptions on the basis it required time to raise capital for exploration on the tenements and argued the Warden misapplied the test by requiring it, in substance, to prove it did not have sufficient capital to plan or conduct exploration.

The Court clarified that s 102(2)(b) requires an assessment of whether time is required to raise capital for the specified purposes, at the time the application is brought.

The applicant's director gave evidence that, in his view, it was in Rivergold's interests to keep a cash reserve of $500,000 to avoid any potential insolvency risks.

The Court determined that the Warden had not required Riversgold to prove it had insufficient capital to plan or conduct exploration. While the Warden had determined that time was required for capital raising activities to occur, he had found the purpose of the capital raising was not to explore the tenements, but to maintain the board's desired cash reserve levels. Consequently, the applicants had failed to establish error by the Warden.

EVIDENCE OF PLANS FOR TENEMENTS CRUCIAL IN EXEMPTION APPLICATIONS

In *Bullseye Mining Limited v WA Prospectors Pty Ltd & Anor* [2023] WAMW 47, Warden Cleary reinforced that evidence of the plans for a tenement is vital, and can be determinative, in certain exemption applications.

The Warden clarified that:

1. an applicant for exemption need not justify the non-compliance giving rise to the application but must satisfy the criteria for exemption.
2. a deliberate commercial decision to divert money away from meeting expenditure requirements does not necessarily mean an exemption will not be recommended.

Bullseye sought exemptions over 16 tenements spread across two projects: the North Laverton Gold Project and the Bullseye Project (which consisted of the Southern Cross Gold Project and the Aurora Project) on two bases:

1. pursuant to s 102(2)(b) of the *Mining Act 1978* (**Act**) that time was required to raise necessary capital to carry out planned exploration activities.
2. pursuant to s 102(3) of the Act on the basis that Bullseye's good track record of expenditure on the subject tenements and its portfolio more broadly, and plan for ongoing work and expenditure on the tenements justified an exemption in the face of its special circumstances. Those special circumstances consisted of Bullseye being restricted in raising capital during the relevant tenement years because of a hostile takeover attempt by Red 5 Limited and other attempts to wrest control of Bullseye from its board (which included Supreme Court proceedings and shareholders twice calling general meetings pursuant to s 249D of the *Corporations Act 2001*).

In respect of both Southern Cross tenements and three out of four Aurora Project tenements, the Warden found that the lack of plans for the individual tenements and those projects as a whole, and the lack of subsequent work and expenditure on those tenements, outweighed the factors in favour of recommending exemption. The Warden therefore recommended refusing those exemptions.

The remaining Aurora Project tenement, and all of the North Laverton tenements, were recommended for approval on both grounds. Bullseye's good track record in respect of those tenements, plans to raise capital and undertake works, and the prevention of those works and capital raising by the corporate hostilities weighed in favour of exemption.

The Warden helpfully set out a number of the principles which apply to exemption applications:

1. The circumstances justifying exemptions pursuant to s 102(2) of the Act fall to be assessed at the time the application for exemption is made. Justification under s 102(3) requires the reasons for the exemption to exist in the expenditure year to which the application relates (as well as at the time of the application).
2. Evidence before and after the expenditure year may be relevant to the Warden's task of assessing the subjective position of the applicant and tenement at the time of application.
3. Under s 102(4) of the Act, the Warden and Minister must consider work done and expenditure incurred on the tenement until the date on which they consider the application (and therefore consider work and expenditure after the relevant expenditure years). A failure to provide evidence of work occurring after the expenditure years may give rise to an inference that no such work has occurred.
4. The payment of directors' fees while minimum expenditure requirements were not met does not necessarily weigh against exemption.
5. The absence of prior exemption applications for the relevant tenements by the same tenement-holder on the same grounds weighed in favour of recommending the grant of the exemptions.

This decision will be among Warden Cleary's last as Perth Mining Warden, following her Honour's elevation to the District Court.

CONSIDERATION OF 'PUBLIC INTEREST' ENTAILS AN EVALUATIVE PROCESS

In *Fox Coal Pty Ltd & Anor v Minister for Resources* [2023] QSC 197 the Queensland Supreme Court set aside the Minister's decision to refuse Fox Coal's application for a mineral development licence (MDL Application), pursuant to s186(2) of the *Mineral Resources Act 1989* (Qld) (MRA), on the basis that the Minister considered the grant was not in the public interest.

The Minister contended that the decision should not be set aside as he had identified a factor determinative of the MDL Application (that the award would not be in the public interest), he was aware of the other factors that may have a bearing on public interest and the decision was rational. The Court disagreed, determining that the Minister did not undertake the required evaluative process.

The determination involved a 2-stage inquiry:

1. **Was an evaluative process required?**

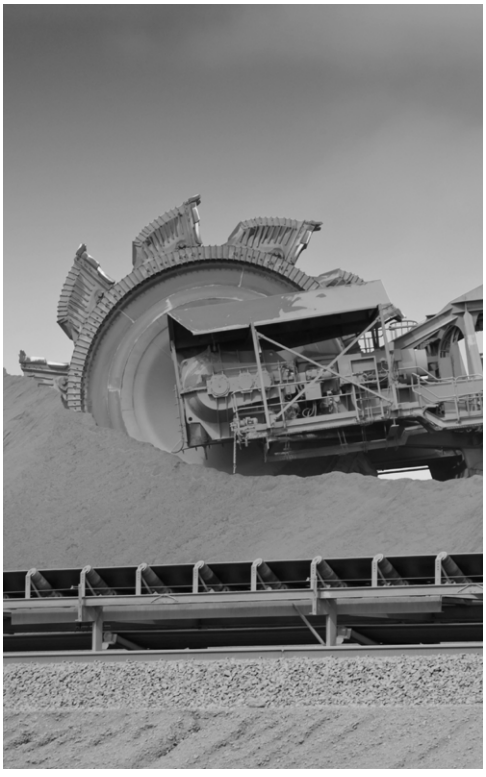
   The Court determined that the Minister's decision required an evaluative process which involved identifying the factors relevant to the assessment of public interest having regard to the MRA and weighing the identified factors to determine where the public interest lies. The Court determined that, while the discretion given to the Minister in each of the 2 steps is very wide, both steps must be undertaken.

2. **Was the required evaluative process undertaken?**

   The Court determined that the reasons provided by the Minister demonstrated that he equated his finding of negative community sentiment as being sufficient to result in the MDL Application not being in the public interest. The Court determined that factors relevant to public interest, both for and against, ought to have been identified and then an evaluative process undertaken. The Court also held that the Minister's mere reference to the material before him when making the decision, was not a sufficient basis to conclude that the Minister engaged in the evaluative process in a practical and real way.

While not necessary for making its determination, the Court also dealt with Fox Coal's submissions that:

1. community sentiment alone was not a relevant factor; rather, the Minister was required to consider whether the adverse community sentiment had a proper reasonable basis. The Court disagreed, stating that *"[t]he existence of community sentiment (whether properly held or baseless) is a factor that can rationally bear on the question of public interest and the Minister was therefore entitled to consider it."*
2. to the extent that community sentiment related to matters not strictly relevant to the MDL Application, they should not have been considered. This was relevant because a successful MDL Application did not entitle Fox Coal to commence mining, as further authorisations would be required. However, the Court determined there was nothing wrong with the Minister, in considering the public interest, looking forward to the next steps in the process. Indeed, doing so was in line with the objects of the MRA (which is concerned with prospecting, exploring and mining).



WA COURT OF APPEAL UPHOLDS INDUSTRY DEFINITION OF REFINING IN TENEMENT SALE AGREEMENT

In Quasar Resources Pty Ltd v APG Aus No 3 Pty Ltd [2023] WASCA 171 the WA Court of Appeal upheld a Supreme Court decision applying what it found to be a widely accepted mining industry definition of refining, rather than its broader ordinary meaning, in respect of a net smelter royalty clause in a 2002 South Australian tenement sale agreement.

The Court heard expert evidence regarding the industry understanding of 'refining' when the contract was entered into. It determined 'refining' to mean *"the final processing of metal bearing products by which impurities are physically separated from the metallic intermediate product, resulting in a pure or nearly pure metal final product"* which did not include any purification processes prior to the final stage. As a result, the costs associated with processing uranium ore into yellowcake were not 'refining' for the purposes of the contract, and could not be deducted from the net smelter returns prior to the calculation of the royalty.

EARNING EXPECTATIONS ANNOUNCEMENTS MISLEADING AND A BREACH OF ASX DISCLOSURE OBLIGATIONS

In *Crowley v Worley Ltd (No 2)* [2023] FCA 1613, the Federal Court of Australia determined that announcements made as to earnings expectations by a listed company, Worley Limited (Worley), constituted representations amounting to misleading or deceptive conduct, and consequently, a breach of continuous disclosure obligations under the ASX Listing Rules. However, the applicant failed to prove any loss.

On 14 August 2013, Worley made an ASX announcement to the effect that it had a solid foundation for expecting earnings growth on their net profit after tax (**NPAT**) for the year ended 30 June 2013 being $322 million.

The Earnings Guidance Statement was based on Worley's internal budget for FY 2013/2014 which forecasted NPAT of $352 million. Worley affirmed the Earnings Guidance Statement again on 9, 10 and 15 October 2013.

On 20 November 2013, Worley announced revised earnings guidance as follows:

"On current indications the company now expects to report underlying NPAT for FY2014 in the range of $260 million to $300 million with first half underlying NPAT in the range of $90 million to $100 million".

Mr Crowley brought proceedings against Worley on behalf of himself and others who purchased Worley shares between 14 August 2013 and 19 November 2013 (**Relevant Period**), and who allegedly suffered loss by reason of Worley's conduct.

Mr Crowley alleged Worley had breached:

- its continuous disclosure obligations under:
  - section 674 of the Corporations Act 2001 (Cth) (Corporations Act); and
  - rule 3.1 of the ASX Listing Rules;
- the prohibition on misleading or deceptive conduct in sections:
  - 1041H of the Corporations Act;
  - 12DA of the Australian Securities and Investments Commission Act 2001 (Cth); and
  - 18 of the Australian Consumer Law (schedule 2 of the Competition and Consumer Act 2010 (Cth).

It was agreed by the parties that the Earnings Guidance Statement was a representation as to future matters to the extent that it conveyed the representation that Worley expected to achieve NPAT in excess of $322 million in FY14. The Court found that Worley did not have a reasonable basis for making the representations and that it was aware of this fact during the Relevant Period. In turn, it had contravened the statutory provisions. While not determinative, the Judge remarked that Worley's history of underperformance against budgets in the period FY09 to FY13 should have provided a basis for senior management to be sceptical about the FY14 budget. Mr Crowley was not awarded damages as he failed to provide evidence establishing the cause and amount of any loss he suffered.

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